IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1712

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee for The Port Authority of New York and New Jersey Consolidated Bonds, Fortieth and Forty-First Series, on its own behalf and on behalf of all holders of Consolidated Bonds of The Port Authority of New York and New Jersey and all others similarly situated,

Appellant,

v.

THE STATE OF NEW JERSEY, BRENDAN T. BYRNE, Governor of the State of New Jersey, and WILLIAM F. HYLAND, Attorney General of the State of New Jersey,

Appellees.

DANIEL M. GABY,

Appellant,

v.

THE PORT OF NEW YORK AUTHORITY, *et al.*,

and

Appellees,

UNITED STATES TRUST COMPANY OF NEW YORK,

Intervenor-Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS APPEAL

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Pursuant to Rule 16 of the Revised Ruies of this Court, Intervenor-Appellee United States Trust Co[illegible]ay of New York moves to dismiss the appeal of Appellant Daniel M. Gaby for want of a substantial federal question.

ARGUMENT

THE APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION; THE 1962 COVENANT WHEN ENACTED WAS CONSTITUTIONAL IN ALL RESPECTS

Appellant's argument that the 1962 Covenant is void because not consented to by Congress does not raise a substantial federal question because (1) Congress in fact did consent to the legislation embodying the 1962 Covenant, and (2) such consent was not even required under settled principles of law.

Appellant's entire appeal rests upon the premise that the movement of persons within the Port District was an important, fundamental and integral part of the plan of port development authorized by Congress in approving the Port Authority Compact; that the 1962 Covenant was in derogation of this mandate rather than in furtherance of it and, therefore, Congressional consent to the Covenant was necessary. (JS 4)

Appellant's case must fail because his premise is based on error. First, rail transportation of persons, while technically authorized by a broad construction of the Compact, was not a problem even considered in 1921 and 1922. Second, even if rail transportation of persons were of importance in the Compact, the Covenant, permitting rather than prohibiting the Port Authority's participation in mass rail transit, was clearly in furtherance of the Compact and, therefore, did not require Congressional consent.

Appellant attempts to rewrite history. The Port Authority was created to coordinate and operate freight, rather than passenger, transportation facilities in the Port of New York. The factual conclusions of the Superior Court, based upon the record below, compel this conclusion:

> "[T]he railroad problem upon which the Commission [the New York, New Jersey Port and Harbor Development Commission, which recommended the establishment of the Port Authority] focused was not that of passenger transit but the handling and distribution of freight and cargo into and out of the Port District, and the comprehensive plan recommended by the Commission *addressed itself exclusively to the transportation and distribution, not of persons but of freight and cargo by rail, and to a lesser extent by ship and motor truck.* In its 474 pages plus appendices, the only significant discussion of passenger traffic in the *Report* is contained in the section dealing with ferries and vehicular tunnels." (A* 47-48) (emphasis added).

Speaking of the Port Authority's 1922 Comprehensive Plan, the Superior Court said:

> "In the Plan, like the *Report* upon which it was based, unification of terminal operations and facilities, consolidation of shipments, adaptation and coordination of existing facilities, improvement of commercial rail, truck and water facilities and other freight handling improvements are set forth as principles to govern the development of the Port Authority. The Comprehensive Plan proposed to establish direct rail freight connections between New Jersey and Manhattan to furnish 'the most expeditious, economical and practical transportation of freight especially meat, produce, milk and other commodities comprising the daily needs of the people.' N.J.S.A. 32:1-29." (A 50).

The North Jersey Transit Commission recognized in 1927 that the Port Authority was an especially *inappropriate* agency to deal with the passenger transit problem, since it was denied the taxing power considered necessary to any solution of the problem (Stip.** 74). In the same year the

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* "A" references are to the pages of Appellant Gaby's Appendix to his Jurisdictional Statement.

** "Stip." references are to the pages of the Stipulation of Fact among counsel for the parties to *United States Trust Company of New York* v. *The State of New Jersey, et al.*, dated December 20, 1974; neither counsel for Appellant Gaby nor counsel for the Port Authority defendants in *Gaby* are parties to the Stipulation, but we do not object to Appellant's repeated citations to the Stipulation since the cited references are, without exception, based upon legislative history or reports subject to mandatory or permissive judicial notice.

New Jersey Legislature directed the Port Authority to assist in mass transit *planning* (Stip. 75), but even this modest incursion on the agency's freight coordination obligations was condemned by Governor Smith of New York, a key figure in the Port Authority's organization (Stip. 76 to 77). Contrary to Appellant's insinuation, (JS 6), Governor Smith's veto of this proposal did not even *suggest* that he viewed the freight problem as only an "initial objective" of the agency. Rather, he viewed it as, in his own words, "the main object and purpose of the Port of New York Authority." (Stip. 77).

In 1959 the two States concluded an interstate compact, which received Congressional consent, establishing the New York-New Jersey Transportation Agency to assume responsibility for public mass transit between the two States. (Stip. 125 to 128). The establishment of this Agency is inexplicable if, as Appellant asserts, the Port Authority already had primary responsibility in this area.

Appellant's Jurisdictional Statement asserts that the 1962 Covenant "effectively made it impossible for the states legislatively to authorize the Authority to plan, coordinate or implement plans for mass transit." (JS 19). Quite the contrary, it was only through enactment of the Covenant that the required private financing was obtained which enabled the Port Authority, for the first time in its history, to assume financial responsibility for a major passenger rail network. It must be remembered that the Port Authority is a self-supporting agency, entirely dependent for its survival on the issuance of revenue bonds to private investors. As the Superior Court said:

> "[T]he fact of the matter is that the Legislature of 1962 concluded it was necessary to place a limitation on mass transit deficit operations to be undertaken by the Authority in the future so as to promote continued investor confidence in the Authority." (A 90).

Nor would the Covenant now stand as a bar to further Port Authority involvement in deficit rail mass transit. It only says that such involvement will be limited to a percentage of the reserves which secure outstanding Port Authority Consolidated Bonds.* The Covenant does not prohibit Port Authority responsibility for a rail mass transit system which can be made self supporting, or for mass transit systems other than rail systems. It does not prohibit Port Authority involvement through a State guarantee of the necessary financing, analogous to the Authority's Commuter Car Program, or with a combination of bondholder consent (expressly contemplated by the Covenant) and advance refunding of affected Consolidated Bonds. It does not in any way preclude other State action in rail mass transit, either directly or through one of their other agencies directly charged with this responsibility.**

A. Congressional consent to the 1962 Covenant was given in advance in 1921 and 1922 when the Bi-State Compact and Comprehensive Plan were approved by Congress.

Appellant's argument that the 1962 Covenant did not receive Congressional consent ignores the fact that this

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* In fact, it was expected that this limitation would permit additional involvement in rail mass transit, but the PATH deficit has vastly exceeded the permitted maximum as a result of the adamant refusal of the Governors of New Jersey and New York to permit the agency to raise PATH fares to competitive levels. (See Stip. 220 to 222).

** As noted by Judge Tyler in *Kheel* v. *Port of New York Authority*, 331 F. Supp. 118 (S.D.N.Y. 1971), *aff'd on other grounds*, 457 F.2d 46 (2d Cir.), *cert. denied*, 409 U.S. 983 (1972):

> "[T]he transit amendment's constraint upon non-self-supporting rail facilities does not *even temporarily* preclude the state legislatures from dealing with mass transit problems by other means, e.g. by enactment of subsidy programs. In these circumstances, the constitutional infringement claimed is illusory." 331 F. Supp. at 122. (emphasis added.)

Court has decided that the legislation embodying the Covenant did not require additional Congressional consent. In *Courtesy Sandwich Shop, Inc.* v. *Port of New York Authority,* 12 N.Y.2d 379, 391, *appeal dismissed for want of a substantial federal question,* 375 U.S. 78, *rehearing denied,* 375 U.S. 960 (1963), the New York Court of Appeals held:

> "[A]ssuming consent to be required for this sort of concurrent action, *the congressional consent originally given in* 1921 *and* 1922 *to the bi-State compact creating the Port Authority expressly contemplated such further co-operative legislation in furtherance of port purposes as was here accomplished.* (Pub. Res. No. 17, 67th Cong., 1st Sess., 42 U.S. Stat. 174; Pub. Res. No. 66, 67th Cong., 2d Sess., 42 U.S. Stat. 822.) Among the Articles of Agreement consented to were articles III, VII and VI, which created the Port Authority with the powers enumerated plus 'such other and additional powers as shall be conferred upon it by the legislature of either state concurred in by the legislature of the other.' Similarly, article XI, following the agreement for an initial comprehensive plan in article X, provides that the Port Authority should 'from time to time make plans for the development of said district, supplementary to or amendatory of any plan theretofore adopted, and when such plans are duly approved by the legislatures of the two states, they shall be binding upon both states with the same force and effect as if incorporated in this agreement.' *Chapter* 209 [the legislation embodying the 1962 Covenant] *clearly falls within the congressional consent given to the articles contemplating the grant to the Port Authority of additional powers within the framework of the compact.*" (emphasis added.)

Appellant does not even cite, let alone distinguish *Courtesy* in his Jurisdictional Statement, although the appeal to this Court in that case was dismissed for want of a substantial federal question (375 U.S. 78), a decision on the merits. A

petition for rehearing was denied (375 U.S. 960). Although *Courtesy* dealt with the 1962 legislation as a whole and not expressly with the validity of the Covenant, its rule of law is dispositive.* The Covenant clearly falls within "such further co-operative legislation in furtherance of port purposes" to which Congress consented in advance, and it constitutes on its face the type of "cordial cooperation in the encouragement of the investment of capital" expressly contemplated by the States in their Compact. *Courtesy* is thus dispositive of the issue of the necessity for congressional consent. *E.g., Hicks* v. *Miranda,* 422 U.S. 332 (1975); *Ohio ex rel. Eaton* v. *Price,* 360 U.S 246, 247 (1959); *Doe* v. *Hodgson,* 500 F.2d 1206 (2d Cir. 1974); *Hall* v. *Thornton,* 445 F.2d 834, 835 (4th Cir. 1971); *Port Authority Bondholders Protective Comm.* v. *Port of New York Authority,* 387 F.2d 259, 262, 263 (2d Cir. 1967); *Cf. Borough of Moonachie* v. *Port of New York Authority,* 38 N.J. 414, 425 (1962).

B. Congressional consent was not required for the 1962 Covenant.

It is well settled that only those undertakings between states which alter the political balance among the states or interfere with federal jurisdiction require congressional consent. *St. Louis & S.F. Ry.* v. *James,* 161 U.S. 545, 562 (1896); *Wharton* v. *Wise,* 153 U.S. 155 (1894); *Virginia* v. *Tennessee,* 148 U.S. 503 (1893); *Kheel* v. *Port of New York Authority, supra; Union Branch R.R.* v. *East Tennessee & Ga. R.R.,* 14 Ga. 327, 340-41 (1853); *Dixie Wholesale Grocery, Inc.* v. *Martin,* 278 Ky. 705, *cert. denied,* 308 U.S. 609 (1939); *Ham* v. *Maine-New Hampshire*

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* As Judge Tyler said in *Kheel* v. *Port of New York Authority, supra,* 331 F.Supp. at 120: "Although the transit amendment, here at issue, was not involved in [*Port Authority Bondholders Protective Comm.* v. *Port of New York Authority*] or its predecessor, I view the disposition in *Courtesy Sandwich Shop* as predominately a legal one and, therefore, equally controlling of this case."

Interstate Bridge Authority, 92 N.H. 268 (1943); *Landes* v. *Landes*, 1 N.Y. 2d 358, 365, *appeal dismissed*, 352 U.S. 948 (1956); *Colgate-Palmolive Co.* v. *Dorgan*, 225 N.W. 2d 278 (N.D. 1974); *Town of Searsburg* v. *Town of Woodford*, 76 Vt. 370 (1904); Attorney General of New Jersey, *Formal Opinion* 1958 No. 9 (July 24, 1958) ("The rule today is that only those compacts and agreements which would aggrandize the political or sovereign power of a State or impede the realization of a national interest or responsibility need the consent of Congress for validity.")

Congress took care in its consents to the 1921 and 1922 Port Authority interstate agreements to reserve to itself the usual federal jurisdiction (42 U.S. Stat. 174, 822), thus expressly preserving its constitutional prerogatives, such as the power to regulate commerce, and thus protecting its real interest under the compact clause. In no way can the 1962 Covenant be construed as infringing on the rights of either states or the United States, which expressly reserved its jurisdiction.

CONCLUSION

The appeal should be dismissed on the ground that no substantial federal question has been raised.

Respectfully submitted,

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